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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 621

JANIS ZALCMANIS, GERTRUDE JANSONS, LORENA JANSONS, ASJA VIVIANA JANSONS, n k a ASJA LIDERS and the Public Administrator of the County of New York, State of New York, Administrator of the Estate of KARLIS JANSONS, Deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	PAGE
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Treaty Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	23
Appendix A—Statutes and Treaty Involved	A-1
B—Opinion and Judgment below and Denial of Motion for Rehearing	B-1
C—Conflicting Opinions	C-1

CITATIONS

Cases:

Castell v. *United States*, 14 Fed. Supp. 654,	6, 9, 10, 11, 21, 22
Escher v. *Burnet*, Sup. Ct. of D. C. at Law #78923 decided 2/5/1931	6, 7, 10, 12, 21, 22
Escher v. *Woods*, 281 U. S. 379	6, 10, 11
Guessefeldt v. *McGrath*, 342 U. S. 308	20
Henkels v. *Sutherland*, 274 U. S. 298	15
Josephberg v. *Markham*, 152 F. (2nd) 644	19
Russian Volunteer Fleet v. *U. S.*, 282 U. S. 481	14
Sarthou v. *Clark*, 78 F. Supp. 139	14, 19
Stadtmuller v. *Miller* 11 F. (2nd) 732	19

PAGE

Overseas Finance Corporation v. Brownell, 133 F. Supp. 615 ..... 14, 15

United States ex. rel. I. G. Farbenindustrie v. Burnet, 65 F. (2nd) 195 ..... 6, 10, 11

White, Treasurer v. Mechanics Securities Corp., 269 U. S. 283 15,

Statutes:

Section 3771, Internal Revenue Code of 1939 (now Section 6611 Internal Revenue Code of 1954) 3, 4, 5, A-2

Section 24 (e), Trading With the Enemy Act; 50 USC App. 24 (e) A-1

Section 36 (e), Trading With the Enemy Act; 50 USC App. 36 (e) A-1

Miscellaneous:

Decision of Chief Hearing Examiner Jones of the Office of Alien Property, not officially reported but admitted as an exhibit pursuant to stipulation of counsel 20

Fifth Amendment to the United States Constitution 4, 15, A-2

Senate Bill 2378, Senate Report 1839, Book 11017, 79th Congress, 2nd Session 12

Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Latvia, 45 Statutes at Large 2641 ..... 4, 9, 14, 16, 17, 18, A-3

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioners, Janis Zalcmanis, Gertrude Jansons, Lorena Jansons, Asja Viviana Jansons, n/k/a Asja Liders and the Public Administrator of the County of New York, State of New York, Administrator of the Estate of Karlis Jansons, deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on June 3, 1959. A motion by the petitioners for rehearing was overruled on October 7, 1959.

Citation to Opinion Below

The opinion of the Court of Claims (R. 37), printed in Appendix B hereto infra, p. B-1, is reported in 173 F. Supp. 355.

Jurisdiction

The judgment of the Court of Claims was entered on June 3, 1959, (R. 37); p. B-1, infra, petitioners filed a timely motion for Rehearing which was overruled by the Court of Claims on October 7, 1959 (R. 79). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1255 (1).

Questions Presented

1. Whether that portion of Sec. 36 (e) Trading with the Enemy Act (50 U. S. C. App. 36 (e)), which bars statutory interest on income taxes erroneously assessed and returned applies to an alien friend.

2. If that portion of Sec. 36 (e) Trading with the Enemy Act (50 U. S. C. App. 36 (e)), which bars statutory interest on returned income tax applies to an alien friend whether said Sec. 36 (e) is unconstitutional as:

A. Depriving the person of property without just compensation and or without due process of law in violation of Amendment 5 of the United States Constitution.

B. Arbitrarily, capriciously and discriminatorily setting up a separate class of taxpayers, i. e.; those whose property has been vested by the Alien Property Custodian.

3. If that portion of Sec. 36 (e) Trading with the Enemy Act (50 U. S. C. App. 36 (e)) which bars statutory interest on returned income tax applies to citizens of the Republic of Latvia whether said Sec. 36 (e) is illegal as in violation of an existing treaty between the Republic of Latvia and the United States.

4. Whether that portion of Sec. 36 (e) Trading with the Enemy Act (50 U. S. C. App. 36 (e)), which bars statutory interest on returned income tax can bar recovery of statutory interest to the taxpayer when the Government has collected interest on the payment of the tax deficiency assessment.

5. Whether American citizens and friendly aliens involuntarily in enemy occupied territory during a war become technical enemies of the United States and thereby are deprived of their legal and constitutional rights.

6. Whether vesting makes the property of American citizens and friendly aliens enemy property.

Statutes and Treaty Involved

The statutory provision involved is Sec. 36(e) Trading with the Enemy Act (50 U. S. C. App. 36 (e)). In addition Sec. 24 (e) Trading with the Enemy Act (50 U. S. C. App. 24 (e)) and Section 3771, Internal Revenue Code of 1939 (now Section

6611 Internal Revenue Code of 1954) are referred to. The Fifth Amendment to the Constitution of the United States was invoked by petitioners in the Court of Claims and is relied on here as is the Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Latvia (Treaty Series 765) (45 Statutes at Large 2641). They are printed in App. A, infra pp. A-3–A-29.

Statement of the Case

Petitioners are citizens of the non-communistic Republic of Latvia, which Republic of Latvia is now and at all times during the period involved, has been the only government of Latvia recognized by the United States and the Public Administrator of New York County representing the Estate of Karlis Jansons, a deceased Latvian National (Amended Petition, Par. 1-2c, R. pp. 7-8). Petitioners are now residents of the United States. On August 6, 1943, the Alien Property Custodian of the United States vested moneys belonging to the petitioners which moneys were the proceeds of the operation of ships owned by the petitioners and insurance moneys paid because of the sinking of said ships (Amended Petition, Par. 14, R. p. 11). On February 7, 1946, the Commissioner of Internal Revenue determined deficiencies in income, excess profits and declared value excess profits taxes for the years 1940, 1941, and 1942, attributable to the operation of the above ships (Stipulation of Facts, Par. 9, R. p. 31). These deficiencies were assessed and pursuant to order of the United States District Court for the Southern District of New York payments of these taxes were, on March 15,

1946, made to the Commissioner of Internal Revenue, (Stipulation of Facts, Par. 13 and 14, R. p. 32), Claims for refund were filed. In 1948 the Alien Property Custodian published a notice of intention to return the vested property and in 1952 the Alien Property Custodian returned all the vested property in its possession to the petitioners because the Alien Property Custodian determined that the petitioners were citizens of the Republic of Latvia, that the Republic of Latvia was not an enemy of the United States and the petitioners had not collaborated with the enemy. This did not include the taxes erroneously assessed because they were still at that time in the possession of the United States Treasury Department. In 1955 it was determined administratively that the entire amount of the taxes, penalties and interest paid on March 15, 1946 had been erroneously assessed and collected and on June 20, 1955 (Stipulation of Facts, Par. 18, R. p. 33) these monies, less small conservatory expenses, were through the Alien Property Custodian returned to the petitioners. By the return of the taxes erroneously assessed and collected all of the vested property was returned to the petitioners. No statutory interest was paid on return of these taxes improperly assessed. Petitioners brought action against the United States in the United States Court of Claims to recover this 6% per annum statutory interest as provided for by Section 3771 Internal Revenue Code of 1939 (now Section 6611 Internal Revenue Code of 1954). The Court of Claims on June 3, 1959, dismissed petitioners petition on the ground that Sec. 36 (e) of the Trading with the Enemy Act (50 U. S. C. App. 36(e)) barred payment of statutory interest (R. p. 37). Petitioners, moved for a rehearing which motion was overruled on October 7, 1959 (R. p. 79).

Reasons for Granting the Writ

1. Section 36 (e) Trading with the Enemy Act (50 U. S. C. App. 36 (e)) has never been interpreted by this court and its interpretation by this court is of major importance particularly in view of the decision by the United States Court of Claims in the instant case which decision interprets Section 36 (e) as barring interest on returned income tax to friendly aliens. Said Section 36 (e) is of major importance since it affects all persons whose property was vested including those not enemies, whose property was erroneously seized by the Alien Property Custodian, including citizens of the United States and all nations either allied with or friendly with the United States during the war.

2. The decision of the United States Court of Claims in the instant case bars statutory interest on returned income tax to friendly aliens. This principle conflicts with the decision of the United States Supreme Court in *Escher* v. *Woods*, (281 U. S. 379) the decision of the United States Court of Claims in *Castell* v. *United States* (14 Fed. Supp. 654); the decision of the United States Court of Appeals for the District of Columbia in *United States ex. rel. I. G. Farbenindustrie* v. *Burnet*, (65 F. (2nd) 195); and the decision of the Supreme Court of the District of Columbia in *Escher* v. *Burnet*, (At Law #78923, decided Feb. 5, 1931, not otherwise reported).

Petitioners in the case at bar are citizens of the Republic of Latvia, the non-communistic Republic of Latvia which is the only government of Latvia recognized by the United States. (Stipulation of Facts, Par. 4, 5, 6, R. p. 30).

The Republic of Latvia of which petitioners are citizens was never an enemy of the United States and was never at war with the United States. Petitioners contend that Sec. 36 (g) applies only to enemy property and they further contend Sec. 36 (c) does not apply to them because their property was not enemy property.

Plaintiffs were never enemies of the United States nor was the Republic of Latvia of which they are citizens ever an enemy of the United States.

The Alien Property Custodian determined that the property of the petitioners was not enemy property and therefore returned it. If the property here involved had been enemy property it would not have been returned by the Alien Property Custodian, and would still be under the control of the Alien Property Custodian.

The cases heretofore decided under Sec. 24 (c) Trading with the Enemy Act, the predecessor section to Sec. 36 (c) Trading with the Enemy Act, sustain the petitioners' position that statutory interest on return of income taxes erroneously assessed and collected is rightfully and legally due to friendly aliens and American citizens whose property was erroneously vested but that statutory interest on returned income taxes is not due where property vested is enemy property properly seized. The Court of Claims in its decision failed to consider and apply this distinction. *Escher* v. *Burnet*, a decision by the Supreme Court of the District of Columbia per Mr. Justice Stafford, at law, No. 78923, decided on Feb. 5, 1931, not otherwise reported, was a case involving a Swiss citizen whose property was vested under the belief

that his property was owned by a German corporation, an enemy alien. Income taxes were paid and ultimately refunded without statutory interest. It was determined by the Alien Property Custodian that the plaintiff, Escher, was never a German citizen and not an enemy alien but had always been a citizen of Switzerland and it was further determined that the property in question had never been owned and was not owned by the German Corporation. The vested property was returned as it was in the case at bar. In that case the Plaintiff brought action against the United States for statutory interest on the tax refund, and the United States defended on the ground that no statutory interest was payable because of Sec. 24 (c) Trading with the Enemy Act, the predecessor section of 36 (c), which barred the receiving of statutory interest because of vesting. The Court held that in this case Section 24 (c) did not apply to the property of friendly aliens which had been wrongfully seized and granted statutory interest to the Plaintiff saying:

> "Upon the best consideration I have been able to give this case I think the petitioners are right in their contention that the general statute allowing interest applies and that Clause (c) of Sec. 24 of the Settlement of War Claims Act does not apply to the property of friendly aliens which has been improperly seized."

In the case at bar there can be no question that the property was the "property of friendly aliens which has been improperly seized". The Petitioners are citizens of the Republic of Latvia. The Republic of Latvia was never an enemy of the United States. The Petitioners as determined by the Alien Property Custodian never collaborated with the enemy.

The Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Latvia has been continuously in force since 1928, without interruption. (Stipulation of Facts, Ex. B, Par. 3, R. p. 30).

In *Castell v. United States*, 14 Fed. Supp. 654, decided by the United States Court of Claims, Castell was the ancillary Executor of one Beta Isenberg, who was a German by blood but had obtained United States citizenship through her husband having become a naturalized citizen of Hawaii and subsequently a citizen of the United States when the citizens of Hawaii were declared to be citizens of the United States. Beta Isenberg resided all through World War I in Germany and did not leave Bremen, Germany, until 1923 when she came to the United States to visit a daughter and returned to Germany in 1924 where she remained until her death. Her property was vested by the Alien Property Custodian under the mistaken belief that it was the property of an enemy alien. Internal Revenue taxes were paid by the Alien Property Custodian which were ultimately refunded without statutory interest. Castell, the Ancillary Executor sued to recover the statutory interest and the United States defended claiming no interest was allowable because of Sec. 24(c), the predecessor of Section 36(c). The Court said at page 658, Par. 6:

> ". . . . it would be extraordinary if a loyal citizen of the United States whose property had been seized and had undergone the misfortune of having it withheld from him for a long period should, when the government had already done him an injury, for which he could recover no

damages be still further injured by being denied the benefits of statutory provisions to which he would have been entitled, if the government had not assumed the custody of his property. Obviously no good reason can be given why he should be so treated nor why Congress should have intended such a result."

In *Escher* v. *Woods*, 281 U. S. 379, decided by the Supreme Court of the United States, Escher was the same Swiss citizen involved in the case of *Escher* v. *Burnet*, supra.

The Supreme Court of the United States held that the Alien Property Custodian is not entitled to deduction of administration expenses not shown to have been actually incurred by the particular property or fund when the property seized was mistakenly seized under the belief it belonged to an enemy alien.

Writing the opinion of the Court Justice Holmes said at pages 384 and 385:

"It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the government for its outlay in doing him harm."

In *United States ex rel. I. G. Farbenindustrie* v. *Burnet*, 65 F. (2d) 195 the Court of Appeals of the District of Columbia held that interest on income tax

returned could not be paid where enemy property had been vested. The *I. G. Farbenindustrie* case clearly involved true enemy property (Property of a German Corporation) and in ruling that interest on income tax could not be paid the Court said:

> "... The Settlement of War Claims Act was dealing with property over which Congress had absolute and complete control. The Alien petitioner had no legal or constitutional claim to recover any part of the seized property, except through the generosity of Congress. Congress, therefore, in dealing with the subject of interest on taxes to be refunded on such property, was legislating alone in respect of that class of property and of that class of ownership."

In the *I. G. Farbenindustrie* case the plaintiffs were clearly enemy aliens whose property had been properly and legally seized. The cases above cited decided by the Supreme Court of the United States and lower Courts clearly show that where income taxes had been paid while property has been vested and statutory interest on these income taxes is sought upon the return of these taxes *a different rule of law is applied to alien friends, such as petitioners in the case at bar and the petitioners in the Escher and Castell cases, than to alien enemies as in the I. G. Farbenindustrie case.*

The Courts have consistently granted interest in such cases to alien friends (*Escher* v. *Burnet*, supra), (*Castell* v. *United States*, supra); and denied such interest to alien enemies (*I. G. Farben*, supra). Since Petitioners are alien friends and since the decision of the Court of Claims on which review is sought denies

these petitioners interest, it is in conflict in principle with the decisions rendered by the United States Supreme Court, The United States Court of Claims and other lesser courts.

Since the decision in the case at bar conflicts with the above cited decisions the petitioners pray that the Supreme Court of the United States grant certiorari.

3. The cases cited in No. 2 above involve Sec. 24 (c) but Section 24 (c) Trading with the Enemy Act was the predecessor Section to Section 36 (c) Trading with the Enemy Act.

Section 36 (c) Trading with the Enemy Act was enacted in 1946 and was enacted to clarify confusion which had arisen in the interpretation of Section 24 (c). (Whether Section 24 (c) was repealed by Sec. 614 of the General Revenue Act of May 29, 1928, a point not involved here). The Senate Report on this bill states (Senate Bill 2378 Senate Report 1839 (Book 11017) 79th Congress 2nd Session):

Section 36:

> "This section requires the payment of Federal, State and local taxes by the Custodian, notwithstanding the fact that property vested in or transferred to him becomes the property of the United States. It has as its precedent section 24 of the Trading with the Enemy Act as it existed before World War II. By reason of doubts as to the continued applicability of Section 24, the Custodian has reserved the payment of current taxes until further explicit authority is granted for the purpose."

Both Sections 24 (c) and 36 (c) had the same purpose—to bar payment of interest on returned income taxes to enemies whose property was rightfully seized, and over which property the Alien Property Custodian had full power of disposition. Neither section was enacted to bar recovery of interest on returned income tax in a case over which the Alien Property Custodian did not have full power of disposition without constitutional violation: i.e. property of American Citizens and friendly aliens. Neither section was intended to take friendly aliens and American citizens out of the general rule of law granting 6% interest on returned income taxes and neither section could have legally and constitutionally had that intention. Sec. 36 (c) was enacted to clarify confusion in the interpretation of Sec. 24 (c) but its very wording shows that it was not enacted to bar recovery of interest to friendly aliens or to upset the rule of law granting interest to friendly aliens in like cases.

4. If Section 36 (c) bars recovery of statutory interest to friendly aliens it is unconstitutional.

Petitioners have contended throughout that Section 36 (c) does not bar recovery of statutory interest to friendly aliens and petitioners here again contend and so contended in the Court of Claims that if said Sec. 36 (c) does bar recovery of statutory interest to friendly aliens as held by the Court of Claims in the instant case (Decision of the Court of Claims P. 4 R. p. 40), then said Sec. 36 (c) is unconstitutional as being in contravention of the Fifth Amendment to the United States Constitution.

The petitioners in this action are friendly aliens (Finding of fact page 5, R. p. 41). They are protected by a Treaty of Friendship, Commerce and Consular Rights between their Country (the Republic of Latvia) and the United States which treaty is now and has been in full force and effect continuously since 1928 to the present day (Stipulation of Facts ¶. 3 R. p. 30).

In *Sarthou* v. *Clark*, 78 F. Supp. 139 the Court said:

> ". . . care must be taken to make secure to 'any person not an enemy or ally of enemy', as such categories are specified in the Act, the right to reclaim his property or to have just 'compensation', for it under the Fifth Amendment to the Constitution of the United States."

In *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489, the Court said:

> "The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution."

Ueberseo Finanz-Korporation v. *Brownell*, 133 F. Supp. 615:

> "It is maintained that to deny Fritz von Opel recovery would be a taking of property without just compensation and a denial of due process of law. The answer to this contention is that friendly aliens are protected by the Fifth Amendment requirement of just compensation but the United States, under the power to wage war and make rules concerning captures on land and water, may confiscate enemy properties. Due

process is preserved by the provision of Section 9 (a) authorizing suit for recovery by any person not an enemy or ally of an enemy."

If the Court of Claims decision stands as to the interpretation of Section 36 (*c*) and its application to friendly aliens then as to friendly aliens (the petitioners here) the provisions of Section 36 (*c*) operate to deprive petitioners of a vested right of property without compensation and without due process of law in contravention of the Fifth Amendment of the Constitution of the United States and as so construed the provisions of said Section 36 (*c*) would therefore be null and void.

In *White Treasurer* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301 the Court said:

> "The United States seized the property in question from an enemy and of course could do with it what it liked."

In *Henkels* v. *Sutherland*, 271 U. S. 298 the Court said:

> "with enemy owned property seized by the Custodian it has been held the United States may deal as it sees fit, *but it has no such latitude in respect of the property of an American citizen.*" (Italics ours.)

Return of the vested property in the instant case by the Alien Property Custodian was a matter of right not of grace since it was non-enemy property. Over enemy property the Alien Property Custodian would have full power of disposition as a prize of war and return of enemy property by the Alien

Property Custodian would be a matter of Congressional grace but as to non-enemy property the return by the Alien Property Custodian was a matter of right, otherwise the Trading with the Enemy Act would have been unconstitutional as taking property without due process of law.

A friendly alien has the protection of the due process clause as do American citizens.

Return of the property being a matter of right not of grace, carried with it all the rights and privileges of property which had not been vested among which is the right to statutory interest on income taxes. To decide otherwise would be unconstitutional as creating a separate class of taxpayers, those whose property had been seized by the Alien Property Custodian and treating them differently from all other taxpayers without distinction whether such seizure was legal and proper or erroneous and wrongful. All other taxpayers would be entitled to statutory interest on returned income tax.

Therefore to interpret Section 36 (e) to deprive plaintiffs here of statutory interest would put them in a separate class of taxpayers and render Section 36 (e) unconstitutional as arbitrary, capricious and discriminatory.

Further, the Petitioners here were protected by the treaty between their country, the Republic of Latvia and the United States and as such were constitutionally entitled to all the rights and privileges bestowed by that treaty:

"The nationals of either High Contracting

Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals." (Article I, 2nd Paragraph, Appendix A-5)

"The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation." (Article I, 4th Paragraph, Appendix A-5)

For Section 36 (c) to deprive the Petitioners of statutory interest here would violate the rights granted them by treaty and be illegal as in violation of an existing treaty between the Republic of Latvia and the United States.

To summarize item 4:

A. Section 36 (c) Trading with the Enemy Act is unconstitutional since Sec. 36 (c) as interpreted by the Court of Claims in the instant case deprives alien friends of property without due process of law and without just compensation.

B. Sec. 36 (c) Trading with the Enemy Act is unconstitutional as interpreted by the Court of Claims since it sets up a separate class of taxpayers—those whose property has been vested and deprives them of statutory interest, arbitrarily, capriciously discrimi-

natorily and without any basis in law without distinction whether such vesting was legal and proper or erroneous and wrongful.

C. Section 36 (c) Trading with the Enemy Act is illegal because it seeks to deprive alien friends, citizens of the Republic of Latvia, of rights, granted by an existing treaty between the United States and the Republic of Latvia.

For these reasons the petitioners pray that certiorari be granted.

5. Vesting does not make property enemy property.

Petitioners argued in the Court of Claims that their property should not have been vested since their property was not enemy property.

The Court of Claims apparently took the position that since the petitioners were "technical enemies" because they were in enemy occupied territory their property was properly vested and that a vesting order could only be set aside by the District Court and that no such determination of setting aside the vesting order was ever made by the District Court.

This part of the opinion of the Court of Claims was in error. District Courts do not set aside vesting orders. The remedy where property has been erroneously vested is not to set aside the vesting but to make the claimant whole by returning the property.

The petitioners may have been technical enemies since they were in enemy occupied territory since their country had been overrun by the enemy. This would

not however bar them from return of their vested property and the courts have so held.

In *Sarthou* v. *Clark*, 78 F. Supp. 139 the Court said:

> "We think 'resident within the territory' as employed in the Act connotes something different from and more than living within the specified areas. It is rather indicative of a settled and permanent place of abode, volitionally acquired and voluntarily assumed. It is a habitation having domiciliary properties."

In *Josephberg et al.* v. *Markham*, 152 F. 2nd 644 the Court said:

> "In determining whether Ceruiti falls within the provisions of the statute authorizing seizure of the property of a citizen of the United States, his physical presence, or to use the phrase of the trial court his 'actual residence' there at the time the vesting order took effect, is not decisive . . ."
>
> "We think 'resident' in the statute and orders imports more than a mere physical presence in a designated enemy country."

Stradtmueller v. *Miller*, 11 F. (2nd) 732:

> "We fail to see that it should make any difference whether the person whose residence was so constrained was a citizen or a domiciled and friendly alien. It is enough that his residence was constrained, his sentiments loyal, and that he did no hostile act."

In *Guessefeldt* v. *McGrath*, 342 U. S. 308 the Court said:

> "To hold that 'resident within' enemy territory implies something more than mere physical presence and something less than domicile is consistent with the emanations of Congressional purpose manifested in the entire Act, and the relevant extrinsic light, including the decisions of lower courts on this issue which we note without specifically approving any of them."

Petitioners were not resident within enemy territory within the meaning of the Trading with the Enemy Act. Their country was forcibly occupied by the Germans.

The Alien Property Custodian said:

> "Zalemanis was never a resident of Germany."
>
> "Gertrude Jansons and her daughters Lorena and Asja Viviana have not since December 7, 1941, been voluntarily resident within Germany."

(Decision of Hearing Examiner Jones—Exhibit added pursuant to stipulation of counsel on day of Argument before Court of Claims).

The fact that the plaintiffs resided in territory forcibly overrun by Germany did not make them "resident within" enemy territory within the meaning of the Trading with the Enemy Act.

The cases cited show that the petitioners could have brought a Section 9 (a) proceeding for return of their vested property if they so desired either in the first instance; or if they had been unsuccessful

in the administrative proceeding for the return under Section 32, since they would not have been classed as enemies or allies of enemies within the meaning of the act and the authorities cited.

The petitioners argued that the taxes and claims for refund should not have been vested. By this argument in the Court of Claims, petitioners did not intend to infer that the vesting was illegal (since no vesting is illegal) but the petitioners only intended to argue that since the Alien Property Custodian after hearing had determined that the petitioners were not enemies within the meaning of the Trading with the Enemy Act and therefore entitled to the return of their property, that the vesting was therefore an erroneous and mistaken vesting, as much as there were mistaken or erroneous vestings in the *Castell* and *Escher* cases cited and discussed fully herein.

The Court of Claims in its opinion stated, "That there was a vesting order which could only be set aside by the District Court."

The plaintiffs contend that the Courts have uniformly held that all vestings are legal and that vesting orders cannot be set aside by the Courts or administratively. The sole remedy of one whose property has been vested is to bring action for return of the vested property pursuant to Section 9(a) or Section 32 of the Trading with the Enemy Act.

Petitioners contend that Section 32 Trading with the Enemy Act is the administrative equivalent of Section 9(a) Trading with the Enemy Act and that persons who have their vested property returned administratively pursuant to Section 32 have the same

rights as those persons who have their vested property returned judicially pursuant to Section 9 (a) and are not deprived of any rights to which they would have been entitled if their property was returned judicially under Section 9 (a).

The vested property was returned pursuant to such Section 32 in the case at bar. Since the property was determined to be non-enemy property and since the property was returned petitioners here are entitled to the statutory interest sought on the income tax return since they are not enemies within the meaning of the Trading with the Enemy Act.

However assuming without conceding that the petitioners here were technical enemies this would not make them enemies sufficient to bar them from the recovery of interest on an income tax return since the cases hold that so called technical enemies can recover interest (i. e.—*Castell* case—interest was allowed—Principal was an American citizen who was resident within Germany and therefore a technical enemy).

6. The Internal Revenue Service collected interest on the deficiency assessment and therefore classified this tax as an interest bearing tax and thereby by its own act the Government took this tax out of the provisions of Section 36 (c).

7. The decision of the Court below barring interest on returned income tax to friendly aliens is believed to be erroneous and the decisions in *Escher* v. *Burjet*, *supra*, and *Castell* v. *U. S.*, *supra*, granting interest on returned income tax to friendly aliens and American citizens correct because for the interpretation to

stand as in the instant case barring interest would be repugnant to our most basic and fundamental constitutional rights.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

December 22, 1959

APPENDIX A

STATUTES AND TREATY INVOLVED

Section 36 (c) Trading With the Enemy Act (50 USC App. 36 (c))

. . . Statutes of limitations on assessment, collection, refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter; but no interest shall be paid upon any refund with respect to any period during which the statute of limitations is so suspended.

Section 24 (e) Trading With the Enemy Act (50 USC App. 24 (e))

In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

Section 3771 of the Internal Revenue Code of 1939, Now Section 6611 of the Internal Revenue Code of 1954, September 1956 Edition.

Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 percent per annum.

Fifth Amendment to the Constitution of the United States

ARTICLE V

TRIALS FOR CRIMES; JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Treaty of Friendship, Commerce and Consular Rights Between the United States and Latvia

TREATY SERIES, NO. 765

45 STATUTES AT LARGE, 2641

SIGNED AT RIGA, APRIL 20, 1928
RATIFICATION ADVISED BY THE SENATE, MAY 3, 1928
RATIFIED BY THE PRESIDENT, JUNE 9, 1928
RATIFIED BY LATVIA, JUNE 29, 1928
RATIFICATIONS EXCHANGED AT RIGA, JULY 25, 1928
PROCLAIMED, JULY 25, 1928
Exhibit: Department of State, United States of America

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Latvia was concluded and signed by their respective Plenipotentiaries at Riga on the twentieth day of April, one thousand nine hundred and twenty eight, the original of which Treaty, in the English language, is word for word as follows:

The United States of America and the Republic of Latvia, desirous of strengthening the bond of peace which happily prevails between them, by arrangements designed to promote friendly intercourse between them, by arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof, have resolved to conclude a Treaty of Friendship, Commerce and Consular Rights and

for that purpose have appointed as their plenipotentiaries:

The President of the United States of America:

FREDERICK W. B. COLEMAN, Envoy Extraordinary and Minister Plenipotentiary,

and

The President of the Republic of Latvia:

ANTONS BALODIS, Minister of Foreign Affairs,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

ARTICLE I

The nationals of each of the High Contracting Parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in scientific, religious, philanthropic, and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to engage in every trade, vocation, manufacturing industry and profession, not reserved exclusively to nationals of the country; to own, erect or lease and occupy appropriate buildings and to lease land for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most

favored by it, submitting themselves to all local laws and regulations duly established.

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the locals laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

Nothing contained in this Treaty shall be construed to affect existing statutes of either of the High Contracting Parties in relation to the immigration, admission or sojourn of aliens or the right of either of the High Contracting Parties to enact such statutes.

ARTICLE II

With respect to that form of protection granted by National, State or Provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself

a national of either of the High Contracting Parties and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.

ARTICLE III

The dwellings, warehouses, manufactories, shops, and other places of business, and all premises thereto appertaining of the nationals of each of the High Contracting Parties in the territories of the other, used for any purposes set forth in Article I, shall be respected. It shall not be allowable to make a domiciliary visit to, or search of, any such buildings and premises, or there to examine and inspect books, papers or accounts, except under the conditions and in conformity with the forms prescribed by the laws, ordinances and regulations for nationals.

ARTICLE IV

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same which term may be reasonably

prolonged if circumstances render it necessary and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

ARTICLE V

The nationals of each of the High Contracting Parties in the exercise of the rights of freedom of worship, within the territories of the other, as hereinabove provided, may, without annoyance or molestation of any kind by reason of their religious belief or otherwise, conduct services either within their own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient situations, provided their teachings or practices are not contrary to public order or public morals; and they may also be permitted to bury their dead according to their religious customs in suitable and

convenient places established and maintained for the purpose, subject to the reasonable mortuary and sanitary laws and regulations of the place of burial.

ARTICLE VI

In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war.

ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

Each of the High Contracting Parties binds itself unconditionally to impose no higher or other duties or conditions and no prohibition on the importation of any article, the growth, produce, or manufacture, of the territories of the other than are or shall be imposed on the importation of any like article, the growth, produce, or manufacture of any other foreign country.

Each of the High Contracting Parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other High Contracting Party than are imposed on goods exported to any other foreign country.

Nothing in this Treaty shall be construed to restrict the right of either High Contracting Party to impose, on such terms as it may see fit, prohibitions or restrictions relating to national defense, public security and public order; prohibitions or restrictions of a sanitary character designed to protect human, animal or plant life; regulations for the enforcement of police or revenue laws.

Any advantage of whatsoever kind which either High Contracting Party may extend to any article the growth, produce, or manufacture of any other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article, the growth, produce, or manufacture of the other High Contracting Party.

All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom in vessels of the United States may likewise be imported into those ports or exported therefrom in Latvian vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; and, reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Latvia or are or may be legally exported therefrom in Latvian vessels may likewise be imported into these ports or exported therefrom in vessels of the United States without being liable to any

other or higher duties or charges whatsoever, than if such articles were imported or exported in Latvian vessels.

In the same manner there shall be perfect reciprocal equality in relation to the flags of the two countries with regard to bounties, drawbacks, and other privileges of this nature of whatever denomination which may be allowed in the territories of each of the High Contracting Parties, on goods imported or exported in national vessels so that such bounties, drawbacks and other privileges shall also and in like manner be allowed on goods imported or exported in vessels of the other country.

With respect to the amount and collection of duties on imports and exports of every kind, each of the two High Contracting Parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third State, and regardless of whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation, be extended to the other High Contracting Party, for the benefit of itself, its nationals and vessels.

ARTICLE VIII

The stipulations of Article VII of this Treaty shall not extend

a) To the treatment which either High Contracting Party shall accord to purely border traffic within a zone not exceeding ten miles 15 kilometers wide on either side of its customs frontier;

b) To the treatment which is accorded by the United States to the Commerce of Cuba under the provisions of the Commercial Convention concluded by the United States and Cuba on December 11th, 1902, or any other commercial convention which hereafter may be concluded by the United States with Cuba, or to the commerce of the United States with any of its dependencies and the Panama Canal Zone under existing or future laws;

c) To the customs preferences or other facilities of whatever nature which are or may be granted by Latvia in favor of Estonia, Finland, Lithuania or Russia and or to the special privileges resulting to States in customs or economic union with Latvia so long as such preferences, facilities or privileges are not accorded to any other State.

ARTICLE IX

The nationals and merchandise of each High Contracting Party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes,

transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties.

ARTICLE X

No duties to tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels. Such equality of treatment shall apply reciprocally to the vessels of the two countries respectively from whatever place they may arrive and whatever may be their place of destination.

ARTICLE XI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

ARTICLE XII

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes

at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward; provided, however, that the coasting trade and the towing service of the United States and the Republic of Latvia are exempt from the provisions of this Article and from the other provisions of this Treaty, and are to be regulated according to the laws of the United States and the Republic of Latvia, respectively, in relation thereto. It is agreed, however, that the nationals of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade and the towing service the most favored nation treatment.

The provisions of this Treaty relating to the mutual concession of national treatment in matters of navigation do not apply to special privileges reserved by either High Contracting Party for the fishing industry and for the national ship-building industry.

ARTICLE XIII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their

juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfil their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State or Provincial laws and regulations.

ARTICLE XIV

The nationals of either High Contracting Party shall enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to the organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise, including the rights of promotion, incorporation, purchase and ownership and sale of shares and the holding of executive or official positions therein. In the exercise of the foregoing rights and with respect to the regulation or procedure concerning the organization or conduct of such corporations or associations, such nationals shall be subjected to no conditions less favorable than those which have been or may hereafter be imposed upon the nationals of the most favored nation. The

right of any of such corporations or associations as may be organized or controlled or participated in by the nationals of either High Contracting Party within the territories of the other to exercise any of their functions therein, shall be governed by the laws and regulations, National, State or Provincial, which are in force or may hereafter be established within the territories of the Party wherein they propose to engage in business. The foregoing stipulations do not apply to the organization of and participation in political associations.

The nationals of either High Contracting Party shall, moreover, enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the other.

ARTICLE XV

Commercial travelers representing manufacturers, merchants and traders domiciled in the territories of either High Contracting Party shall on their entry into and sojourn in the territories of the other Party and on their departure therefrom be accorded the most favored nation treatment in respect of customs and other privileges and of all charges and taxes of whatever denomination applicable to them or to their samples.

If either High Contracting Party require the presentation of an authentic document establishing the identity and authority of a commercial traveler, a

signed statement by the concern or concerns represented, certified by a consular officer of the country of destination, shall be accepted as satisfactory.

ARTICLE XVI

There shall be complete freedom of transit through the territories including territorial waters of each High Contracting Party on the routes most convenient for international transit, by rail, navigable waterway, and canal, other than the Panama Canal and waterways and canals which constitute international boundaries, to persons and goods coming from, going to or passing through the territories of the other High Contracting Party, except such persons as may be forbidden admission into its territories or goods of which the importation may be prohibited by law or regulations. The measures of a general or particular character which either of the High Contracting Parties is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may in exceptional cases and for as short a period as possible involve a deviation from the provisions of this paragraph; it being understood that the principle of freedom of transit must be observed to the utmost possible extent.

Persons and goods in transit shall not be subjected to any transit duty, or to any unnecessary delays or restrictions, or to any discrimination as regards charges, facilities or any other matters.

Goods in transit must be entered at the proper custom house, but they shall be exempt from all customs or other similar duties.

All charges imposed on transport in transit shall be reasonable, having regard to the conditions of the traffic.

ARTICLE XVII

Each of the High Contracting Parties agrees to receive from the other consular officers in those of its ports, places and cities, where it may be convenient and which are open to consular representatives of any foreign country.

Consular officers of each of the High Contracting Parties shall, after entering upon their duties, enjoy reciprocally in the territories of the other all the rights, privileges, exemptions and immunities which are enjoyed by officers of the same grade of the most favored nation. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the State which receives them.

The Government of each of the High Contracting Parties shall furnish free of charge the necessary exequatur of such consular officers of the other as present a regular commission signed by the chief executive of the appointing State and under its great seal; and it shall issue to a subordinate or substitute consular officer duly appointed by an accepted superior consular officer with the approbation of his Government, or by any other competent officer of that Government, such documents as according to the laws of the respective countries shall be requisite for the exercise by the appointee of the consular function. On the exhibition of an exequatur, or other document issued in lieu thereof to such subordinate, such consular officer shall

be permitted to enter upon his duties and to enjoy the rights, privileges and immunities granted by this Treaty.

ARTICLE XVIII

Consular officers, nationals of the State by which they are appointed, shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment. Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.

In criminal cases the attendance at the trial by a consular officer as a witness may be demanded by the prosecution or defense. The demand shall be made with all possible regard for the consular dignity and the duties of the officer; and there shall be compliance on the part of the consular officer.

Consular officers shall be subject to the jurisdiction of the courts in the State which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the State which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties.

ARTICLE XIX

Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services.

Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited.

ARTICLE XX

Consular officers may place over the outer door of their respective offices the arms of their State with an appropriate inscription designating the official office. Such officers may also hoist the flag of their country

on their offices including those situated in the capitals of the two countries. They may likewise hoist such flag over any boat or vessel employed in the exercise of the consular function.

The consular offices and archives shall at all times be inviolable. They shall under no circumstances be subjected to invasion by any authorities of any character within the country where such offices are located. Nor shall the authorities under any pretext make any examination or seizure of papers or other property deposited within a consular office. Consular offices shall not be used as places of asylum. No consular officer shall be required to produce official archives in court or testify as to their contents.

Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, secretaries or chancellors, whose official character may have previously been made known to the Government of the State where the consular function was exercised, may temporarily exercise the consular function of the deceased or incapacitated or absent consular officer; and while so acting shall enjoy all the rights, prerogatives and immunities granted to the incumbent.

ARTICLE XXI

Consular officers, nationals of the State by which they are appointed, may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon

the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative a consul general or the consular officer stationed at the capital may apply directly to the government of the country.

ARTICLE XXII

Consular officers may, in pursuance of the laws of their own country, take, at any appropriate place within their respective districts, the depositions of any occupants of vessels of their own country, or of any national of, or of any person having permanent residence within the territories of, their own country. Such officers may draw up, attest, certify and authenticate unilateral acts, deeds, and testamentary dispositions of their countrymen, and also contracts to which a countryman is a party. They may draw up, attest, certify and authenticate written instruments of any kind purporting to express or embody the conveyance or encumbrance of property of any kind within the territory of the State by which such officers are appointed, and unilateral acts, deeds, testamentary dispositions and contracts relating to property situated, or business to be transacted within, the territories of this State by which they are appointed, embracing unilateral acts, deeds, testamentary dispositions or agreements executed solely by nationals of the State within which such officers exercise their functions.

Instruments and documents thus executed and copies and translations thereof, when duly authenticated under his official seal by the consular officer shall be received as evidence in the territories of the High

Contracting Parties as original documents or authenticated copies, as the case may be, and shall have the same force and effect as if drawn by and executed before a notary or other public officer duly authorized in the country by which the consular officer was appointed; provided, always, that such documents shall have been drawn and executed in conformity to the laws and regulations of the country where they are designed to take effect.

ARTICLE XXIII

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

When an act committed on board of a private vessel under the flag of the State by which the consular officer has been appointed and within the territorial waters of the State to which he has been appointed constitutes a crime according to the laws of that State, subjecting the person guilty therof to punishment as a criminal, the consular officer shall not exercise jurisdiction except in so far as he is permitted to do so by the local law.

A consular officer may freely invoke the assistance of the local police authorities in any matter pertain-

ing to the maintenance of interial order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given.

A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the State to which he is appointed to render assistance as an interpreter or agent.

ARTICLE XXIV

In case of the death of a national of either High Contracting Party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested.

In case of the death of a national of either of the High Contracting Parties without will or testament, in the territory of the other High Contracting Party, the consular officer of the State of which the deceased was a national and within whose district the deceased made his home at the time of death, shall, so far as the laws of the country permit and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of the same. Such consular officer shall have the right to be appointed as administrator within the discretion of a tribunal

or other agency controlling the administration of estates provided the laws of the place where the estate is administered so permit.

Whenever a consular officer accepts the office of administrator of the estate of a deceased countryman, he subjects himself as such to the jurisdiction of the tribunal or other agency making the appointment for all necessary purposes to the same extent as a national of the country where he was appointed.

ARTICLE XXV

A consular officer of either High Contracting Party may, in behalf of his non-resident countryman, receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.

ARTICLE XXVI

A consular officer of either High Contracting Party shall have the right to inspect within the ports of the other High Contracting Party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels, and to be enabled thereby to execute in a correct manner bills of health and other docu-

ments required by the laws of his country, and to inform his Government concerning the extent to which its sanitary regulations have been observed at ports of departure by vessels destined to its ports, with a view to facilitating entry of such vessels therein.

ARTICLE XXVII

Each of the High Contracting Parties agrees to permit the entry free of all duty of all furniture, equipment and supplies intended for official uses in the consular offices of the other, and to extend to such consular officers of the other and their families and suites as are its nationals, the privilege of entry free of duty of their baggage and all other personal property accompanying the officer to his post; provided, nevertheless, that no articles the importation of which is prohibited by the law of either of the High Contracting Parties, may be brought into its territories. Personal property imported by consular officers, their families or suites during the incumbency of the officers in office shall be accorded the customs privileges and exemptions accorded to consular officers of the most favored nation.

It is understood, however, that the privileges of this Article shall not be extended to consular officers who are engaged in any private occupation for gain in the countries to which they are accredited, save with respect to governmental supplies.

ARTICLE XXVIII

All proceedings relative to the salvage of vessels of either High Contracting Party wrecked upon the

coasts of the other shall be directed by the consular officer of the country to which the vessel belongs and within whose district the wreck may have occurred. Pending the arrival of such officer, who shall be immediately informed of the occurrence, the local authorities shall take all necessary measures for the protection of persons and the preservation of wrecked property. The local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if these do not belong to the crews that have been wrecked, and to carry into effect the arrangements made for the entry and exportation of the merchandise saved. It is understood that such merchandise is not to be subjected to any custom house charges, unless it be intended for consumption in the country where the wreck may have taken place.

The intervention of the local authorities in these different cases shall occasion no expense of any kind, except such as may be caused by the operations of salvage and the preservation of the goods saved, together with such as would be incurred under similar circumstances by vessels of the nation.

ARTICLE XXIX

Subject to any limitation or exception hereinabove set forth, or hereafter to be agreed upon, the territories of the High Contracting Parties to which the provisions of this Treaty extend shall be understood to comprise all areas of land, water, and air over which the Parties respectively claim and exercise dominion as sovereign thereof, except the Panama Canal Zone.

ARTICLE XXX

Except as provided in the third paragraph of this Article the present Treaty shall remain in full force for the term of ten years from the date of the exchange of ratifications, on which date it shall begin to take effect in all of its provisions.

If within one year before the expiration of the aforesaid period of ten years neither High Contracting Party notifies to the other an intention of modifying, by change or omission, any of the provisions of any of the articles in this Treaty or of terminating it upon the expiration of the aforesaid period, the Treaty shall remain in full force and effect after the aforesaid period and until one year from such a time as either of the High Contracting Parties shall have notified to the other an intention of modifying or terminating the Treaty.

The sixth and seventh paragraphs of Article VII and Articles X and XII shall remain in force for twelve months from the date of exchange of ratifications, and if not then terminated on ninety days' previous notice shall remain in force until either of the High Contracting Parties shall enact legislation inconsistent therewith when the same shall automatically lapse at the end of sixty days from such enactment, and on such lapse each High Contracting Party shall enjoy all the rights which it would have possessed had such paragraphs or articles not been embraced in the Treaty.

ARTICLE XXXI

The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Riga as soon as possible.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the same and have affixed their seals hereto.

Done in duplicate, at Riga, this 20th day of April, 1928.

[SEAL] F. W. B. Coleman [SEAL] A. Baloďis

And whereas the said treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged at Riga on the twenty-fifth day of July, one thousand nine hundred and twenty-eight;

Now, therefore, be it known that I, Calvin Coolidge, President of the United States of America, have caused the said Treaty to be made public to the end that the same and every article and clause thereof may be observed and fulfilled in good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the city of Washington, this twenty-fifth day of July in the year of our Lord one thousand nine hundred and twenty-eight,
[SEAL] and of the Independence of the United States of America the one hundred and fifty-third.

CALVIN COOLIDGE

By the President:

FRANK B. KELLOGG
Secretary of State

PROTOCOL.

Accompanying Treaty of Friendship, Commerce and Consular Rights.

At the moment of signing the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Latvia, the undersigned plenipotentiaries, duly authorized by their respective Governments, have agreed as follows:

1. The provisions of Article XVI do not prevent the High Contracting Parties from levying on traffic in transit dues intended solely to defray expenses of supervision and administration entailed by such transit, the rate of which shall correspond as nearly as possible with the expenses which such dues are intended to cover and shall not be higher than the rates charged on other traffic of the same class on the same routes.

2. Wherever the term "consular officer" is used in this Treaty it shall be understood to mean Consuls General, Consuls, Vice Consuls and Consular Agents to whom an exequatur or other document of recognition has been issued pursuant to the provisions of paragraph 3 of Article XVII.

3. In addition to consular officers, attachés, chancellors and secretaries, the number of employees to whom the privileges authorized by Article XIX shall be accorded shall not exceed five at any one post.

In Witness Whereof the undersigned Plenipotentiaries have signed the present Protocol and affixed thereto their respective seals.

Done in duplicate, at Riga, this 20th day of April, 1928.

[SEAL] F. W. B. Coleman [SEAL] A. Baloḍis

APPENDIX B

Opinion and Judgment Below and Denial of Motion for Rehearing

IN THE UNITED STATES COURT OF CLAIMS

No. 250-56

(Decided June 3, 1959)

JANIS ZALCMANIS, GERTRUDE JANSONS, LORENA JANSONS, ASTA VIVIANA JANSONS, a/k/a ASTA LIDELS AND THE PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, STATE OF NEW YORK, ADMINISTRATOR OF THE ESTATE OF KARLIS JANSONS, DECEASED v. UNITED STATES

Mr. Robert H. Law, III for the plaintiffs. *Mr. Robert H. Law, Jr.* was on the briefs.

Mr. Theodore D. Peyser, Jr., with whom was *Mr. Assistant Attorney General Charles K. Rice*, for the defendant. *Mr. James P. Garland*, and *Mr. Lyle M. Turgeon* were on the brief.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

Plaintiffs, alien residents of the United States, sue to recover interest on a refund of tax and interest made by the Commissioner of Internal Revenue to the Attorney General as successor to the Alien Property Custodian.

A previous motion for summary judgment by defendant was denied without prejudice and plaintiffs were permitted to amend their petition to allege facts sufficient to allow them to bring suit against the United States under 28 U. S. C. 2502. See *Zalemanis et al. v. United States*, 157 Ct. Cls. 543.

The pertinent facts are sufficiently set forth in the body of this opinion.

The first question presented is whether plaintiffs now have alleged and proved a right to sue in the Court of Claims under 28 U. S. C. 2502. Section 2502 reads as follows:

> Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject-matter of the suit is otherwise within such court's jurisdiction.

We think this question can only be answered in the affirmative. Plaintiffs were and are citizens of the Republic of Latvia. The overrunning of Latvia and the resulting incorporation of the country into the Union of Soviet Socialist Republics did not take from them their citizenship in the Republic of Latvia. In fact, the Republic of Latvia as it was constituted before the invasion by the Union of Soviet Socialist Republics is still recognized by the United States, and the treaty between the United States and Latvia permitting United States citizens free access to Latvian courts is still in full force and effect. However, there are in fact no courts maintained by the government in exile and all claims must be administratively determined

[illegible] United States and Latvia, Treaty Series

mitted. This situation exists through no fault of the plaintiffs. We think it would be a harsh construction of section 2502, *supra*, to say that this takes from plaintiffs the right to sue in the Court of Claims. To do so would be to deny the continued existence of the treaty previously referred to when in fact our Government has seen fit to recognize said treaty as a continuing international agreement between the Republic of Latvia and the United States. Until such time as the United States recognizes Latvia as it is constituted today, and no longer adheres to the treaty between the two governments, plaintiffs continue to enjoy the freedoms of this court.

This brings us to the question of plaintiffs' right to recover interest on the refund of taxes.

The taxes here in question were paid by trustees pursuant to an order of the District Court, Southern District of New York, at a time in which all property of plaintiffs was vested pursuant to the Trading With the Enemy Act, *infra*, in the Alien Property Custodian. The District Court's order was because of plaintiffs' ownership of two vessels which were libeled by Soviet Russia in connection with the nationalization of all private Latvian property. The trustees had been appointed to operate the vessels pending final determination of the libel action. Subsequently both vessels were sunk by enemy action and thereafter insurance moneys were collected on said vessels and held by the trustees as funds obtained from the operation of the vessels. At the time the taxes were paid the insurance moneys were still in the hands of the trustees.

Under section 36(a) of the Trading With the Enemy Act, 50 App. U.S.C., the vesting in the Alien Property Custodian did not render inapplicable [illegible]

paid tax liability for a period prior to the date of the vesting. Accordingly, the District Court ordered and the trustees paid an assessed deficiency for taxes claimed by the Commissioner of Internal Revenue to be due for the years 1940, 1941, and 1942. The court further ordered that the trustees file claims for refund and take necessary steps to prosecute said claims in the United States District Court.

On June 29, 1946, the District Court ordered the trustees to turn over all funds held by them to the Alien Property Custodian in consequence of the 1943 vesting order. The court determined that the Alien Property Custodian had acquired all right, title, interest and claim in and to said property. The court further ordered that the direction to the trustees to file claims for refund be stricken and ordered the Alien Property Custodian to take necessary steps to prosecute the claims for refund. Thus the plaintiffs and the trustees no longer had any rights or interest in the processing of claims for refund. Consequently, the only person having such a right to process claims for refund was the Alien Property Custodian. On July 13, 1948, the Attorney General of the United States, successor to the Alien Property Custodian, filed claims for refund for taxes paid out of property vested pursuant to Vesting Order No. 1911.

Prior to filing claims by the Attorney General, plaintiffs filed similar claims for refund, apparently as a protective measure. However, at this time plaintiffs had no right or interest in the tax money held by the Commissioner of Internal Revenue.

On May 20, 1952, the Attorney General paid the sum of $8,140.62 to plaintiff Jānis Zaleteums and a similar sum to plaintiff Public Administrator. This action constituted a partial divesting but did not in

clude any right to, or interest in, the claims for refund.

In 1955 it was administratively determined that the taxes paid in 1946 had been erroneously collected. Hence refund was made to the Attorney General, who on June 20, 1954, by Return Order No. 2420, paid plaintiffs the sum of $398,140.32, without interest.

It is plaintiffs' contention that they are entitled section 3771 of the Internal Revenue Code of 1939 to interest on the $398,140.32 from date of payment to date of refund. We think this contention is without merit because the situation falls within the provisions of the Trading With the Enemy Act.

Section 36(c) of the Trading With the Enemy Act, *supra*, provides in part:

> * * * Statutes of limitations on assessment, collection refund, or credit of Federal taxes shall be suspended, with respect to any vested property or interest, or the earnings, increment or proceeds thereof, while vested and for six months thereafter; but no interest shall be paid upon any refund with respect to any period during which the statute of limitations is so suspended. * * *

Under the above quoted section interest on a refund of taxes cannot be paid during the period of a suspension of the statute of limitations. The act specifically provides that such suspension shall be in effect while property is vested and for six months thereafter.

The money represented by the tax refund was vested in 1943 and divested and paid to plaintiffs in June of 1955. Under the clear terms of the act no interest would be payable until six months after the divesting.

Since payment under the divesting order was made

during the statutory period of the suspension of the statute of limitations, plaintiffs are not entitled to interest as claimed.

Plaintiffs argue that neither the original sum of $97,687.19 paid for taxes, nor the claims for refund should have been vested. A full answer to this contention is that there was a vesting order which could only be set aside by the District Court. Sections 7(c)(1) and 9(a) of the Trading With the Enemy Act, *supra*.

No such determination was ever made by a District Court.

For the above reasons plaintiffs' petition must be dismissed.

It is so ordered.

BRYAN, *District Judge*, sitting by designation; MADDEN, *Judge*; WHITAKER, *Judge*, and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the stipulation of the parties, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiffs Janis Zalemanis, Gertrude Jansons, Lorena Jansons, and Asja Jansons are citizens of the Republic of Latvia residing in the United States of America. The remaining plaintiff, The Public Administrator of the County of New York, is the duly appointed Administrator of the Estate of Karlis Jansons, deceased, who during his lifetime was a citizen of the Republic of Latvia.

2. Janis Zalcmanis and Karlis Jansons were owners of the Latvian steamships *Abgara* and *Ciltvaira*, and Gertrude Jansons, Lorena Jansons, and Asja Jansons are the widow and daughters of the deceased Karlis Jansons.

3. In June of 1940 the forces of the Union of Soviet Socialist Republics invaded the Republic of Latvia, took possession of its territory and enacted nationalization laws. At the time of this invasion, the plaintiffs' ships were in the western hemisphere.

4. On or about November 28, 1940, the steamships *Abgara* and *Ciltvaira* were libeled by the instrumentalities of Soviet Russia in the United States District Court for the Southern District of New York, Number Admiralty 122-40. The libel actions were for possession of the Latvian ships based upon the fact that Soviet Russia had nationalized all private property.

5. Pursuant to the libel action described in finding 4, Charles Recht and Joseph G. Kearns were appointed by the District Court as Trustees to operate the vessels pending the final determination of the libel action. This was done in order to keep the vessels on the high seas during the wartime emergency.

6. Both the *Abgara* and *Ciltvaira* were sunk by enemy action in the Battle of the Atlantic during World War II. The *Ciltvaira* went down on January 19, 1942, and the *Abgara* was sunk May 6, 1942. Thereafter insurance moneys were collected on the said vessels and were held by the trustees as funds obtained from the operation of the vessels.

7. On August 6, 1943, the Alien Property Custodian issued Vesting Order No. 1911 which vested these moneys subject to the deduction of any attorney's fees and trustees' fees, commissions and expenses as might be payable pursuant to an order of the District Court. The order included the finding that Karlis Jansons and plaintiff Janis Zalemanis had at least a claim to these moneys and that the national interest of the United States required that they be treated as nationals of Germany, an enemy country. These moneys amounted to $837,225.51.

8. On February 7, 1946, the Commissioner of Internal Revenue determined deficiencies in income, excess profits, and declared value excess profits taxes for the year 1940, 1941, and 1942 attributable to the operation of the *Abava* and *Ciltvaira* during those years, and the receipt of the insurance proceeds after their sinking. These deficiencies were assessed and, pursuant to order of the District Court and the consent of the Alien Property Custodian, payment was made out of the vested moneys in the amount of $597,687.49 on March 15, 1946. The court also ordered the trustees to file claims for refund and to prosecute said claims in the District Court.

9. In July 1946, pursuant to further orders of the District Court dated June 29, 1946, the remaining moneys on deposit in the names of the trustees were paid over to the Alien Property Custodian and the trustees assigned to him all their rights to a tax refund. The court further ordered that the previous order to the trustees to file claims for refund be stricken. The orders directed the Alien Property Custodian to file the necessary claims for refund and

to bring, as expeditiously as possible, a suit for recovery thereof. The Court determined that by the 1943 vesting order, the Alien Property Custodian had acquired all right, title and claim in and to plaintiffs' property.

10. On February 18, 1947, claims for refund of this tax were filed by plaintiff Janis Zalemanis, plaintiff Public Administrator of the County of New York, as administrator of the estate of Karlis Jansons, and the same public administrator as administrator of the estate of Janis Freimanis. Similar claims were filed on July 13, 1948, on behalf of the Attorney General of the United States as successor to the Alien Property Custodian. The claims for refund filed by plaintiff Janis Zalemanis and plaintiff Public Administrator of the County of New York were filed in order to protect any interest said plaintiffs might have in the moneys in the hands of the Commissioner of Internal Revenue.

11. On May 20, 1952, the Attorney General paid the sum of $89,110.62 to plaintiff Janis Zalemanis and a similar sum to plaintiff Public Administrator. Each of these sums represented approximately one-third of the vested funds remaining after the March 15, 1946 tax payment.

12. In 1955, it was determined that the taxes, penalties, and interest paid in 1946 had been erroneously assessed and collected. The ground for this determination was that the income previously taxed was exempt under sections 212(b)(1) and 231(c)(1) of the Internal Revenue Code of 1939 as earnings derived from the operation of ships documented under

the laws of a foreign country (in this instance, Latvia) which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States. Accordingly, on March 29, 1955, the Treasury Department paid to the Alien Property Custodian the amount previously collected, the sum of $397,704.49, which was refunded without interest. On June 15, 1955, Return Order No. 2420 was issued directing return of one-third of the refund to Janis Zalcmanis and one-third to the Public Administrator of New York County, administrator of the estate of Karlis Jansons, subject to certain expenses. On June 20, 1955, the Alien Property Custodian paid the sum of $199,070.16 to Janis Zalcmanis and a similar sum to the Public Administrator.

13. Plaintiffs Gertrude Jansons, Loreta Jansons and Asja Jansons appear in this suit in their capacity as the sole heirs, distributees, and next of kin of Karlis Jansons.

14. Prior to the seizure and occupation of the Republic of Latvia by Soviet Russia in June of 1940, a citizen of the United States had the right to prosecute claims against the Republic of Latvia in its courts. Since the occupation of Latvia by Soviet Russia in June of 1940, the Republic of Latvia has had no courts, and claims against it could only be processed administratively.

15. The 1928 Treaty between the United States and Latvia, Treaty Series, No. 765, reads in part:

> The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other, on conforming to the local

laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The 1928 Treaty is still in full force and effect.

16. The incorporation of Latvia by the Union of Soviet Socialist Republics is not recognized by the United States.

Dr. Arnold Spekke is Charge d'Affaires of Latvia to the United States and Acting Consul General of Latvia in the United States, and the Diplomatic List of April 1958, issued by the Department of State, shows on page 29, under Latvia the name of Dr. Arnold Spekke as Minister Plenipotentiary, Charge d'Affaires.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are not entitled to recover, and their petition is therefore dismissed.

UNITED STATES COURT OF CLAIMS

No. 250-56

JANIS ZALCMANIS, et al.

v.

THE UNITED STATES

Clerk's Office

Washington, D. C., October 7, 1959

To Attorney of Record and Assistant Attorney General, and Commissioner .....

SIR:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order:

OVERRULED

Very truly yours,

WILLARD L. HART, Clerk, Court of Claims.

APPENDIX C

Conflicting Opinions

ESCHEU, ANCILLARY ADMINISTRATOR, ET AL. v. WOODS, TREASURER OF THE UNITED STATES, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 305. Argued April 17, 1930. Decided April 28, 1930.

"Upon recovery by citizens of a neutral country of the value of property mistakenly seized during the late war as belonging to an alien enemy, the Alien Property Custodian is not entitled to a deduction for administration expenses not shown to have been incurred in respect of the particular property or fund. P. 383."

33 F. (2) 556, reversed.

CERTIORARI, 280 U. S. 511, to review a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of the District in a suit against the Alien Property Custodian.

Mr. Spier Whitaker, with whom *Messrs. Lawrence A. Baker, Littleton Fox, Henry Eschen*, and *Henry Bascom* were on the brief, for petitioners.

The Alien Property Custodian was not given, and constitutionally could not be given, the right to appropriate from the money of petitioners, as so-called administrative expenses, the sum of $55,900.83, or any part of it, and therefore the judgment of the Court of Appeals should be reversed and the decree of the Supreme Court of the District of Columbia affirmed because:

A. The provisions of the Trading with the Enemy Act expressly limit the deductions for expenses to the amounts actually and necessarily incurred on account of the particular money and property from which the deduction is sought to be made; and

B. Even if this would include any part of the salaries and other general expenses of operating the Custodian's office which we deny the provisions of the Fifth Amendment do not permit the Custodian to appropriate under the guise of expenses any percentage of petitioners' money and property, much less a percentage arbitrarily fixed by him without notice to the owner; and

C. The bringing of petitioners' suit under § 9 of the Trading with the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, ~~any provision of the statute to the contrary notwithstanding,~~ the utmost that the Custodian can charge against petitioners upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property; and

D. The respondents having deducted the full amount of all expenses ~~directly~~ attributable to the money and property of petitioners and having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of petitioners' money and property, the Custodian has no right to deduct and withhold any additional amount whatsoever on account of his so-called "administrative expenses."

Assistant Attorney General Rugg, with whom *Attorney General Mitchell*, *Messrs. Claude R. Branch* and *Thomas E. Rhodes* and *Mary G. Connor*, Special Assistants to the Attorney General, and *Mr. J. Fraud Staley* were on the brief, for respondents.

I. The Act of March 4, 1923, specifically provided that the Custodian might pay the necessary expenses incurred by him in securing the possession, collection, or control of money or other property seized by him, or in protecting or administering the same, out of funds seized by the Custodian. This Court has held that the Custodian was authorized to seize property supposed to belong to an enemy even before an adjudication that it was enemy property, and has recognized that all property seized by the Custodian should be administered by him.

The Act of March 28, 1918, vests the Custodian with all the powers of a common law trustee in respect of all property seized by him. Congress intended that the entire cost of administering the office should be borne by the trust funds administered by him. The practice of deducting for administrative expenses a fixed percentage of the trust funds upon their return to the owners had been in force for several years before the passage of the Act of March 4, 1923, and that Act operated as a confirmation of the existing practice.

Moreover, it is universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. This Court has said that proper charges and expenses may be deducted even from property wrongfully seized.

II. The deduction of a flat rate charge of two per cent. has been determined by the Custodian to be the lowest amount necessary to cover the expenses incurred by him in collecting, protecting, and administering the seized property.

The principal of the trust estate of the petitioners amounted to over $3,000,000, and the estate was administered by the Custodian for over ten years. The amount deducted is about two per cent. of the principal sum returned, and is about five per cent. of the total income.

The petitioners admit that the Custodian could deduct exact amounts expended in the administration of their property, but contend that they should not be charged "one cent more than the actual expense of protecting or administering such property" or anything on account of the general expenses of the Custodian's office. If deductions can not be made for this purpose, it is obvious that the authority given to the Custodian to pay expenses from trust funds will be largely ineffective. It was unavoidable that the Custodian should make mistakes and seize the property of non-enemies.

The action of the Custodian in determining this method and amount is presumed to be reasonable and proper.

III. The deduction by the Custodian of a fixed percentage to cover administrative costs or expenses did not deprive the petitioners of their property without due process of law. The Trading with the Enemy Act was passed under Art. I, § 8, Cl. 11 of the Constitution empowering Congress to declare war and make rules concerning captures on land and water. The power vested in the President to make

rules and regulations with respect to the administration of property seized by the Custodian included the power to regulate the administrative expenses to be deducted from seized property.

Therefore, the method employed by the Executive Department of deducting a flat rate of two per cent. from the petitioners' seized property was the exercise of the discretionary power vested in the President, which is not reviewable. The power conferred by the Act to take enemy-owned property included the authority to seize property believed to belong to an enemy. This Act, and its amendments and the Executive Orders of the President, authorized the Custodian to make the deductions in question, as stated above. The Fifth Amendment does not prevent the exercise of war powers, and the Executive must have wide discretion as to the means to be employed in order to carry out the war successfully.

Moreover, it is not open to the petitioners to raise any constitutional question, as none was raised in the record in the courts below.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by citizens of Switzerland to recover property mistakenly seized during the late war as belonging to an alien enemy. The plaintiffs recovered, but on a statement of account by the Alien Property Custodian he claimed a deduction of $55,909.83 for administrative expenses, "said sum having been paid by [him] into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid." On a rule to show cause the claim was disallowed by the Supreme Court of the District of Columbia, but the decision was re-

versed by the Court of Appeals. 33 F. (2d) 556. A writ of certiorari was granted by this Court.

In the answer to the motion to show cause why the charge should not be stricken out it was not alleged and no evidence was offered to show that the expenses actually incurred in respect of the particular fund were equal to this sum, or what, if any, they were. It was said to be impracticable to prove them or to apportion the general expenses of the office. The amount was two per cent. of the assets handled over and it is said that without pleading or evidence the record shows this to be a reasonable charge.

To sustain the deduction the respondents rely upon the Trading with the Enemy Act of October 6, 1917, c. 106, § 12; 40 Stat. 411, 423, amended by Act of March 28, 1918, c. 28; 40 Stat. 459, 460, by which the Alien Property Custodian is "vested with all the powers of a common law trustee" in respect of all property, "other than money," received by him under the Act and may exercise any powers appurtenant thereto "as though he were the absolute owner thereof." They also invoke Executive Order, February 26, 1918 (No. 2815) that the Custodian "may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property . . . and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs." Also Order of July 16, 1918, (No. 2910), of which it is necessary to mention only the direction that the expenses "shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which" the expenses shall have arisen provided

that if the property or assets of the business are insufficient, they may be satisfied out of other property "received from, or as the property of, the same enemy." Under these Acts and Orders the Custodian has adopted the course followed in this case and it is further urged that his conduct is tacitly ratified by the later Acts of March 4, 1923, c. 285, adding § 24 to the original Act, which embodies so much of the above orders as limits the liability to expenses incurred in respect of the same property, and to the property concerned or other property of the same person, 42 Stat. 1511, 1516; and May 16, 1928, c. 580; 45 Stat. 573, 574, that "all expenses of the office . . . including compensation of the Alien Property Custodian . . . shall be paid from interest and collections on trust funds and other properties under the control of such Custodian." It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it or at least others similarly due from the same owner. But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were

to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See *Hobbs* v. *McLean*, 117 U. S. 567, 582.

Decree reversed.

CASTELL v. UNITED STATES.

14 Fed Supp 654.

No. L-167.

COURT OF CLAIMS.

May 4, 1936.

1. INTERNAL REVENUE—38(15).

Executor of loyal citizen whose property had been withheld under Trading with the Enemy Act could recover interest allowed to citizen on overpayment of income taxes made by Alien Property Custodian which was credited on delinquent taxes and interest barred by limitation, though provision of Settlement of War Claims Act forbade payment of interest on any refund of taxes when property had been seized, since provision was inapplicable to property of citizen which had been mistakenly seized (Trading with the Enemy Act, see 50 U.S.C.A. Appendix, § 1 et seq.; Revenue Act 1926, § 1116, 26 U.S.C.A. § 1671 note; Settlement of War Claims Act of 1928; § 18 (c), 50 U.S.C.A. Appendix, § 24 (c).

2. INTERNAL REVENUE—38(15).

Taxpayer's executor, recovering balance of interest accruing on refund of income taxes which had been

credited on delinquent taxes for prior year which were barred by limitation, *held*, not entitled to interest on such interest (31 U.S.C.A. § 227).

Action by George O. Castell, ancillary executor under the last will and testament of Beta Isenberg, deceased, against the United States.

Judgment for plaintiff.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following special findings of fact:

1. The petition in this action was originally filed by Beta Isenberg May 5, 1930. Beta Isenberg was born in Bremen, Germany, in 1846, and in 1869 was married to Paul Isenberg. In 1871 Paul Isenberg became a naturalized citizen of Hawaii. In 1900, as a result of an act of Congress making citizens of Hawaii citizens of the United States, Paul Isenberg and his wife, Beta Isenberg, became citizens of the United States.

Prior to the death of her husband in 1903, Beta Isenberg had lived part of the time in Hawaii and the remainder of the time in Germany having been in each of those places from time to time during that period. After her husband's death, she did not return to Hawaii, but, except as indicated below, lived at No. 19 Contrascarpe, Bremen, Germany, in a house which her husband had purchased in 1881 and which she inherited from him at his death. She came to the United States from Germany in March, 1923, to visit her daughter and returned in July, 1923, with her daughter, going from the United States to England and continental Europe, including Germany. She

returned to the United States in October, 1923. Having been informed of the serious illness of her sister, she returned to Germany in May, 1924. She remained in Germany from May 1924, until her death March 10, 1933, at Bremen. About 1925 she gave her feeble condition and ill health as the reason for remaining in Germany.

Thereafter, by appropriate motion, George O. Castell, the duly appointed and acting ancillary executor under the last will and testament of Beta Isenberg, was substituted as plaintiff. The said George O. Castell is a citizen of the United States, has at all times borne true allegiance to the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the United States.

2. During the calendar year 1917 Beta Isenberg owned certain stocks and bonds of corporations doing business in the Territory of Hawaii. That property was then held for Beta Isenberg, under a power of attorney from her, by H. Hackfeld & Co., Limited, an American corporation organized under the laws of California, with its principal place of business in Honolulu, Hawaii. December 31, 1917, the aforementioned corporation received for Beta Isenberg and credited to her account on its books certain income from such property.

3. February 27, 1918, the then Alien Property Custodian, pursuant to the Trading with the Enemy Act, 40 Stat. 411 [illegible] 50 U.S.C.A. Appendix, [illegible] seized and acquired all property of Beta Isenberg in Hawaii, including the income referred to in the preceding finding. That property was subsequently held and administered by the Alien Property Custodian under the designation "Trust No. 12,611."

and, except for administration expenses (including federal taxes), the proceeds of the property and net accretions thereto were returned by the Alien Property Custodian to Beta Isenberg in installments during the years 1926, 1927, and 1928, under the following circumstances:

April 17, 1925, Beta Isenberg, through her attorneys, filed a bill in equity in the Supreme Court of the District of Columbia against Frederick C. Hicks, Alien Property Custodian, and Frank White, Treasurer of the United States, under section 9 of the Trading with the Enemy Act, as amended by Act March 4, 1923, c. 1 (50 U.S.C.A. Appendix, § 9 note), for the return of her seized property. In said cause the Supreme Court of the District of Columbia entered a final decree February 20, 1926, for the return of the property and proceeds of the sale of all or any part thereof, together with accretions thereto, income thereon, or increase thereof. The defendants noted an appeal from that decree, which appeal, on motion of the defendants, was dismissed April 8, 1926, prior to the hearing thereof.

4. March 31, 1924, the Alien Property Custodian, on behalf of Beta Isenberg, paid the collector of internal revenue for the district of Maryland $600,810.70 as Beta Isenberg's individual income tax for the calendar year 1919.

5. August 18, 1926, the Commissioner of Internal Revenue determined that Beta Isenberg's income tax for the calendar year 1919 had been overpaid in the amount of $150,783.52. That overpayment was paid to the Alien Property Custodian on behalf of Beta Isenberg in the manner hereinafter stated, and is

not contested nor is it in controversy herein. Of the aforementioned overpayment the Commissioner credited $49,821.62 to additional assessments of income taxes against Beta Isenberg for the years 1921 to 1925, both inclusive; $2,695.15 to accrued interest on income taxes of Beta Isenberg for the years 1921 to 1923, both inclusive, and on September 1, 1926, refunded to the Alien Property Custodian on behalf of Beta Isenberg, $898,260.75.

6. Subsequently the Commissioner determined that interest was allowable to Beta Isenberg under section 1116 of the Revenue Act of 1926 (26 U. S. C. A. § 1671 note), on the overpayment for 1919 referred to in finding 5, in the amount of $60,757.21. There is no dispute as to the correctness of the interest computation. Of the foregoing amount of $60,757.21, $34,922.69 was paid to the Alien Property Custodian March 14, 1927, on account of trust No. 12,611, for Beta Isenberg, and is not contested, nor is it in controversy herein. The balance of $25,834.52 is the amount here in controversy. Prior to making payment of the foregoing amount of $34,922.69 the Commissioner on December 1, 1926, scheduled the entire amount of $60,757.21 to the collector of internal revenue for the District of Hawaii with the following directions:

> "The following item representing interest allowed on overassessment for the year 1919 and covered by notice of interest allowance is listed on this schedule as the collector's authority to credit as much as necessary of the interest due to the taxpayer in connection with her 1919 overassessment to outstanding tax and interest thereon due from the taxpayer for the year 1917 and to certify the balance for payment."

On the same day the assistant to the Commissioner wrote a letter to the collector of internal revenue for the district of Hawaii, stating in part as follows:

> "Transmitted herewith is schedule 23115 carrying notice of interest allowance ($60,757.21) representing interest allowed to the above-named taxpayer [Beta Isenberg] on an overassessment for 1919 and certificate of overassessment ($28,680.00) for the year 1917. While it is not the general practice of this office to credit amounts allowed as interest, such action is contemplated in the instant case by reason of the fact that there appears to be delinquent tax outstanding for 1917 on which considerable amount of interest has accrued and which would soon become uncollectible by the expiration of the statutory period for its collection."

December 13, 1926, the collector carried out the aforesaid instructions and applied $19,094.83 of the interest allowance to an additional assessment of income tax against Beta Isenberg for the calendar year 1917, and $6,739.99 to interest on the additional assessment for 1917. That action was approved by the Commissioner by appropriate schedule under date of January 7, 1927.

On or about March 14, 1927, the Commissioner mailed to the Alien Property Custodian on behalf of Beta Isenberg a notice of interest allowance with respect to the overpayment for 1919, on which he showed that $25,834.52 of the interest allowed had been credited, as indicated above, against additional tax and interest for 1917. A check for $34,922.69, the balance of the interest allowance of $60,757.21, was included with the foregoing notice.

At the time the foregoing credits were made the statutory period for collection of any additional income tax from Beta Isenberg for the calendar year 1917 and interest thereon had expired.

June 23, 1927, attorneys for Beta Isenberg protested against the action of the Commissioner in making the credit of $25,834.52 against the additional income tax for 1917 and interest thereon and demanded refund and payment to Beta Isenberg of the amount of $25,834.52 so applied by the Commissioner, on the ground that the collection of the amount against which the credit had been made in said sum was barred by the applicable statute of limitations.

To that demand the deputy commissioner of internal revenue replied by letter dated February 11, 1928, in part as follows:

> "It is believed that in view of the great uncertainty as to the whole matter, no action toward making refunds should be taken by the Bureau in reliance upon the New York and Albany Liberage Company decision, unless and until the situation is clarified by further court decisions or by legislative action. This applies equally to those cases in which overassessments have been credited to a year, collection of the outstanding tax for which may apparently be barred by the statute of limitations."

7. July 24, 1928, the assistant to the Commissioner instructed the collector of internal revenue for the district of Hawaii as follows:

> "The Income Tax Unit states that the credits were made after the expiration of the statute of

limitations for collection and that further investigation disclosed that the entire interest represents an erroneous allowance in accordance with section 18 (c) of the Settlement of War Claims Act of 1928 [50 U.S.C.A. Appendix, 24 (c)]. It, therefore, will be necessary for you to reverse the credits totaling $25,831.52 applied to the December 1920 list no. 52, and the December 1921 list no. 53019.

"Your accounts should be adjusted by debiting account 62 and crediting account 18. Please attach a copy of this letter to the form 820 on which this transaction is reflected. An appropriate notation should be made on your copies of the certificate of overassessment and the schedule. It also will be necessary for you to procure from the Alien Property Custodian a check for $31,522.52 covering the interest returned. This check should be returned to this office to be deposited as a repayment to the appropriation from which drawn. A form 813 supported by form 53 should be prepared in your office to eliminate the outstanding liability as the result of this adjustment."

8. On or about August 7, 1928, the collector complied with the instructions set out in finding 7. The additional tax and interest of $25,831.52 for the calendar year 1917 were thereafter duly abated. The Commissioner refused to pay the said interest of $25,831.52 theretofore allowed to Beta Lumber, on the ground that section 18 (c) of the Settlement of War Claims Act of 1928 [50 U.S.C.A. Appendix, 24 (c)] prohibited him from making any payment of interest to said Beta Lumber or on her behalf.

Counsel for Beta Isenberg thereafter duly protested against said action of the Commissioner but the Commissioner has continuously refused to make payment of the said amount of $25,854.52 or any part thereof.

John Enriotto, of Washington, D. C., Charles D. Hamel, of Washington, D. C., and Brainard Avery and Albert G. Avery, both of New York City, on the briefs, for plaintiff.

Elizabeth B. Davis, of Washington, D. C., and Robert H. Jackson, Asst. Atty. Gen., for the United States.

Before Booth, Chief Justice, and Graven, Littleton, Williams, and Whitaker, Judges.

Graven, Judge.

The plaintiff is an executor of the estate of Beta Isenberg, a loyal citizen of the United States, who died March 10, 1933, in Bremen, Germany, where she had resided continuously since the year 1903.

After the United States declared war against Germany, the Alien Property Custodian, acting under the provisions of the Trading with the Enemy Act, 40 Stat. 411 (see 50 U.S.C.A. Appendix, 1 et seq.), seized certain stocks and bonds belonging to Beta Isenberg. On April 17, 1925, Beta Isenberg brought suit in the Supreme Court of the District of Columbia for the return of her property, and in a final decree dated February 20, 1926, that court ordered that her property together with accretions be returned to her. In the year 1924 the Alien Property Custodian paid to the United States on behalf of Beta Isenberg the amount of $20,810.70 as income taxes for the year 1919. In 1926 the Commissioner decided that an overpayment had been made in the amount of $450.78, which was accordingly paid to Beta Isenberg.

Subsequently the Commissioner determined that Beta Isenberg was entitled to interest on this overpayment in the amount of $60,757.21. Of this amount $44,922.69 was paid to Beta Isenberg, but the remaining amount of $25,834.52 was applied as a credit on delinquent taxes for 1917 and interest thereon. Against this action, Beta Isenberg protested on the ground that the collection of taxes for the year 1917 was barred by the Statute of Limitations. This protest was sustained and the Commissioner revised the claim but refused to pay Beta the $25,834.52 on the ground that section 18 of the Settlement of War Claims Act of 1928, 50 U.S.C.A.Appendix, 24 bars personal payments. The plaintiff, as executor of the estate of Beta Isenberg, now brings suit to recover the sum so withheld.

Section 2 (a) of the Trading with the Enemy Act, 50 U.S.C.A.Appendix, 2 (a) provides:

"2. The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, * * * resident within the territory * * * of any nation with which the United States is at war."

The Settlement of War Claims Act of 1928, 45 Stat. 254, provides in section 18, 50 U.S.C.A.Appendix, 24, for the amendment of section 24 of the Trading with the Enemy Act and subdivision (a) of section 18, 50 U.S.C.A.Appendix, 24 (a) reads as follows:

"(a) In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien

Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax."

[1] The only question in the case is whether the provisions above set forth are applicable and prohibit the payment of the interest in controversy.

The Trading with the Enemy Act became a law October 6, 1917. The Settlement of War Claims Act was adopted in 1928. In determining the proper construction of these acts, it is necessary not only to consider the language used, but also the purpose of these acts in connection with the circumstances to which they are applicable.

After the war was over and before the War Claims Settlement Act was passed, the courts decided that where the property of a loyal citizen of the United States or a citizen of a neutral country had been seized, the owner could bring a suit against the Alien Property Custodian to have his property restored to him. After the War Claims Settlement Act was passed, questions arose as to the extent of its application and in particular as to whether it had any application to cases involving property other than that of an alien enemy. The case of Escher v. Woods, 281 U.S. 379, 50 S.Ct. 337, 338, 74 L.Ed. 918, although not decided under the War Claims Settlement Act having been begun in 1921, was one in which property

owned by a citizen of Switzerland had been mistakenly seized by the Alien Property Custodian and instead of returning the property in its entirety, the Custodian sought to deduct expenses incurred in connection therewith under general provisions contained in Presidential Orders and the Act of March 4, 1923, 42 Stat. 1511, 1515, c. 2, 50 U.S.C.A.Appendix, 21 and note). But the Supreme Court held that:

> "All of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution."

In line with this statement it may be said that it would be extraordinary if a loyal citizen of the United States whose property had been seized and who had undergone the misfortune of having it withheld from him for a long period should, when the government had already done him an injury for which he could recover no damages, be still further injured by being denied the benefits of statutory provisions to which he would have been entitled if the government had not assumed the custody of his property. Obviously no good reason can be given why he should be so treated nor why Congress should have intended such a result.

The converse of this proposition was before the court in the case of United States ex rel. I. G. Farbenindustrie Aktiengesellschaft v. Burnet, 62 App.

D.C. 107, 65 F.(2d) 195, 196. In that case an alien enemy whose property had been seized by the Alien Property Custodian contended that he was entitled to interest on an overpayment in respect of income tax collected from the Alien Property Custodian. The overpayment was refunded, but the Commissioner, applying section 48 (e) refused to pay any interest on the overpayment, holding that the provisions of the Revenue Act of 1928 did not apply. The court, construing the War Claims Settlement Act and speaking with reference to the property of alien enemies which had been seized, said:

> "Congress * * * was legislating alone in respect of that class of property and of that class of ownership."

And further that:

> "Section 24 [48] (e) * * * placed a limitation upon the payment of interest on taxes refunded under the Settlement of War Claims Act, which related to the special subject of the settlement of claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian. The Settlement of War Claims Act embraced all of these subjects, and was in the nature of a final disposition thereof. Congress was here dealing with a separate and individual matter unrelated to the Revenue Act of 1928, which contained no reference to the prior act or sought to repeal any of the provisions contained therein."

The question here decided was specifically ruled upon in the case of U. S. ex rel. Escher et al. v. Burnet (not reported). A summary of this decision is found in 1931 C. C. H., par. 9456. In this case the court held that section 24 [18] (c) upon which plaintiff relies did not apply where property of a friendly alien had been wrongfully seized; a fortiori it would not apply where the property of an American citizen had been wrongfully seized.

As before stated, Beta Isenberg filed a bill in equity on April 17, 1925, in the Supreme Court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States for the return of her seized property, and that court rendered a final decree February 20, 1926, for the return of the property or the proceeds of its sale and any accretions thereto. When this suit was begun against the Alien Property Custodian, he was acting as the agent for the government and a judgment against him would also be conclusive against the United States. See Escher, Adm'r, v. United States, 68 Ct. Cl. 173 (certiorari denied). By this judgment the court also held in effect that Beta Isenberg was not an enemy but a loyal citizen of the United States. Otherwise she had no right of recovery, and she must be so treated in the case now before us. It is so clear that Beta Isenberg when in fact a loyal citizen could not be made a hostile enemy by legislative act that we cannot assume Congress so intended. The main purpose of the Trading with the Enemy Act was to provide for the seizure not only of property which belonged to those who were actually enemies, but also of those who might be enemies or who themselves would be more or less under the control of enemies. We conclude that in applying the term "enemy" to all individuals residing

within enemy territory, Congress intended and meant that for the purpose of seizing property and keeping it in custody until its status could be determined such persons were to be regarded as enemies.

We do not think that Faber v. United States, 10 F.Supp. 602, 81 Ct.Cl. 142, when the claims of the plaintiff and the basis of the court's decision are considered, can be deemed an authority to the contrary.

In the case last cited the plaintiff was executor of the estate of a nonresident citizen of the United States whose property had been seized by the Alien Property Custodian, who, on the death of the testatrix, paid to the United States an estate tax which was in part determined by the inclusion of certain administrative expenses. The plaintiff in the case made an altogether different contention from that raised in the case at bar and the questions submitted to and determined by the court were also entirely different. It was claimed by the plaintiff in that case that, after the property was seized, the testatrix was not the owner of any estate in the United States, title and possession being in the Alien Property Custodian. For this reason it was argued that it was not subject to tax under the Revenue Acts in force at that time. It was also contended that section 403 (b), (1) of the Revenue Act of 1918 (40 Stat. 1098) relating to deductions which were allowed in computing estate taxes was unconstitutional as applied to a nonresident citizen of the United States for the reason that while the property was in the custody of the Alien Property Custodian the plaintiff was not the owner thereof. This last objection was, as the opinion in the case states, "the gravamen of the complaint" and its validity depended upon the status of the property while in the hands of the Alien Custodian. The court in consider-

ing the effect of the seizure correctly held that the position of the testatrix "*in war times*" (italics supplied) under the Trading with the Enemy Act was the same as though she had been an alien enemy, but that the title to the property seized did not become vested in the United States, and that the provisions of the Revenue Act of 1918 were not unconstitutional. In other words, that under its war powers the government could take custody of the property, but as held by other courts the government acquired only a possessory right for the time being and the ownership of the property was not lost. No principle was laid down which would conflict with the construction which we have given to the Trading with the Enemy Act.

It is contended on behalf of the defendant that the provisions of the War Claims Settlement Act forbidding the payment of interest on any refund of taxes when property has been seized are general and absolute and that, as the property of plaintiff was lawfully seized these provisions must apply. This, we think, must depend upon the construction of the War Claims Settlement Act when considered in the light of surrounding circumstances and the purpose intended to be effectuated by it. In determining this question it must not be forgotten that the plaintiff's intestate was not an alien enemy but a loyal citizen and, said by Mr. Justice Holmes in Escher v. Woods, *supra*, the property was "unlawfully seized" and the possession acquired was one "that the law requires [Alien Custodian] to surrender." The War Claims Settlement Act was primarily intended to deal with the claims of alien enemies whose property had been seized. It involved such difficult questions and such a great amount of money or property that the rights of [illegible] as to [illegible] were not dis-

appear to have been treated as not being affected by its provisions. The failure to specially exempt the property of loyal citizens from the provisions of a bill designed to dispose of property of alien enemies does not, we think, show that the War Claims Settlement Act was intended to apply to the property of citizens of the United States which had been mistakenly seized. The language used in Escher v. Woods, supra, that "all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold" is equally applicable to the provisions of the War Claims Settlement Act, now under consideration and it follows that plaintiff is entitled to recover.

What we have said above makes it unnecessary that we should determine whether plaintiff had any vested rights in the interest which he seeks to recover or whether the provision in question if given the construction contended for by defendant would be constitutional when applied to loyal citizens of the United States. It must be conceded that the government can grant or withhold interest as Congress sees fit to provide and also that it may discriminate between residents and nonresidents as classes, but the classification made for such purposes must be reasonable and it would seem that to allow interest to loyal citizens whose property had not been seized and deny it to those whose property had been seized would be an arbitrary and capricious discrimination. If we are correct in this, it furnishes an additional reason for holding that Congress did not so intend. [2] Plaintiff seeks to recover not only the balance of the interest which had accrued on the refund amounting to $[illegible],152, but also interest on this sum from January 1, 1927, to March 3, 1933. This claim for interest on

interest is based on the Act of March 3, 1875, as amended by the Act of March 3, 1933, § 13 (31 U.S.C.A. § 277). But we do not think this statute has any application to the case. It will be observed that the Commissioner in his first action allowed the interest on the refund, paid part of it, and credited the balance now in suit upon other taxes. Subsequently he reversed his ruling with reference to the credit of the taxes and held that he was restrained from making any further payment of interest by the provisions of the War Claims Settlement Act. We need not determine whether this last ruling had the effect of setting aside the one that he had first made. In either event the case is not covered by the language of the statute and plaintiff's claim for interest on interest must be denied.

Plaintiff is entitled to recover $25,834.52, for which a judgment in his favor will be entered.

UNITED STATES ex rel. I. G. FARBENINDUSTRIE AKTIENGESELLSCHAFT v. BURNET, Commissioner of Internal Revenue, et al.

No. 5888.

65 Fed. 2nd 195

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Argued Feb. 16, 1933.

Decided April 10, 1933.

1. INTERNAL REVENUE ⇐ 161.

Provision of Settlement of War Claims Act that no interest should be allowed on internal revenue tax refund involving property in possession of Alien Property Custodian *held* not impliedly repealed by

General Revenue Act subsequently passed at same session providing for payment of interest on overpayments of internal revenue taxes (Settlement of War Claims Act of 1928, § 18 (c), 50 USCA Appendix § 24 (c); Revenue Act 1928, § 614 (a) (2), 26 USCA 2614 (a) (2).

2. Statutes 162.

Special statute relating to particular subject is not repealed by later general statute relating to same subject, in absence of manifest inconsistency, unless later act specifically provides for repeal of earlier act, or for general repeal of all acts relating to subject.

3. Statutes 159.

Presumption against implied repeals is strong where provisions supposed to conflict are in same act or were passed at nearly same time.

4. Statutes 225¼.

Statutes enacted at same session should receive construction, if possible, giving effect to each.

> Such statutes are within the reason of the rule governing the construction of statutes in pari materia, and each is supposed to speak the mind of the same Legislature, and words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at same session.

Appeal from the Supreme Court of the District of Columbia.

Mandamus proceedings by the United States, on the relation of I. G. Farbenindustrie Aktiengesellschaft, against David Burnet, Commissioner of Internal Revenue, and others. From a judgment of dismissal, relator appeals.

Affirmed.

Conway P. Coe of Washington, D. C., and G. F. von Kolnitz, Jr., of New York City, for appellant.

Thomas E. Rhodes, Leo A. Rover, Harrison F. McCoginell, Roy St. Lewis, Phillip M. Marcum, all of Washington, D. C., for appellees.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

VAN ORSDEL, Associate Justice.

This appeal is from a judgment of the Supreme Court of the District of Columbia, dismissing appellant's petition for a writ of mandamus to compel the Commissioner of Internal Revenue to compute and allow, and to compel the Treasurer of the United States to pay to the Alien Property Custodian, interest on a tax refund which was made to the Alien Property Custodian for appellant's account in May 1929.

It appears that in 1918 the Alien Property Custodian seized the capital stock of an American corporation, held by three individuals as trustees for a German corporation. The petitioner is the successor in interest of the German corporation. After the seizure by the Alien Property Custodian, he sold the stock for $5,290,332.08, which amount was deposited in the Treasury of the United States in an identified trust account.

On March 15, 1924, internal revenue taxes assessed against the three individual trustees, from whom the stock was seized, in the amount of $3,262,268.91, were paid by the Alien Property Custodian out of moneys deposited in the trust account. The Custodian filed a claim for refund of the taxes so paid, which claim was allowed, and the full sum was repaid to the Custodian on March 15, 1929, but no interest was paid thereon.

This suit is to compel the Commissioner of Internal Revenue to compute the interest on said taxes from 1924 to 1929, and to require the Treasurer of the United States to pay the same to the Alien Property Custodian. To the petition, setting forth in substance the above facts, the respondents answered, admitting the facts, but challenging the jurisdiction of the court on the ground that mandamus is not a proper remedy, and challenging the right of the petitioner to the payment of interest on its claim. Petitioner demurred to the answer. The demurrer was overruled, and, petitioner electing to stand upon its demurrer, a judgment was entered dismissing the petition, from which this appeal was taken.

We think this case can be disposed of on the single question of the right of the petitioner to recover interest for the period during which the money paid, as a tax, was in the possession of the government. Petitioner contends that its case comes within the provisions of section 611 of the General Revenue Act of May 29, 1928, 45 Stats. 791, 876 (26 USCA § 2611 (a) (2)), which provides as follows: "(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows: * * * (2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by

not more than 30 days, such date to be determined by the Commissioner."

Respondents rely upon the provisions of section 18 of the Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, 276-50 USCA Appendix, § 24 (c), which reads as follows: "(c) In case of any internal revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax."

[1, 2] It is contended by the petitioner that the later General Revenue Act of May 29, 1928, operates as a repeal by implication the provisions of section 18, supra. This contention, we think, is untenable on several grounds. The Settlement of War Claims Act was in the nature of special legislation, relating to alien property seized and in the hands of the Alien Property Custodian, and providing for the disposition thereof, while the General Revenue Act of 1928 was general legislation, relating to the collection of income taxes by the national government. It is elementary that a special statute relating to a particular subject, in the absence of manifest inconsistency, will not be repealed by the mere enactment of a later general statute relating to the same subject, unless the later act specifically provides for the repeal of the

earlier act, or for a general repeal of all acts relating to the subject.

[3] The acts here in question were passed at the same session of Congress, but [illegible] a short time intervened between the passage of the Settlement of War Claims Act and the General Revenue Act. In Lewis' Sutherland on Statutory Construction (2d Ed.) Vol. I, 268, the author under the head of acts passed at the same session says: "The presumption is strong against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or, if such change had occurred, that the legislature would express it in a different act without an express repeal of the first."

And, in reference to the construction to be placed upon such statutes, passed at the same session of the legislature, the same author continues: "Statutes passed at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in pari materia. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, to effectuate both intention and effect, so as to give validity and effect to every enactment passed at the same session."

Applying the above rule to the acts here in question we find no difficulty in construing or interpreting them. The Settlement of War Claims Act was

dealing with property over which Congress had absolute and complete control. The alien petitioner had no legal or constitutional claim to recover any part of the seized property, except through the generosity of Congress. Congress, therefore, in dealing with the subject of interest on taxes to be refunded on such property, was legislating alone in respect of that class of property and of that class of ownership.

On the other hand, under the General Revenue Act, Congress was dealing with a matter of taxation upon the property of the citizen, whose constitutional and property rights were involved, and upon which the taxing power could only be exercised under strict rules of general equality. The subject-matter of the two acts was radically different; the class of property involved in the two acts was radically different; hence there is no legal basis upon which the provisions of the revenue act can be held to repeal by implication the interest provisions of the earlier Settlement of War Claims Act.

Though it be conceded that the two acts treat generally of the same subject, it by no means follows that the later act may be regarded as repealing by implication the earlier act. Such an implication arises only where there is an inconsistency between the two acts which cannot be reconciled. No such inconsistency here exists. In *Rodgers v. United States*, 185 U. S. 83, 87, 22 S. Ct. 582, 583, 46 L. Ed. 816, the court said: "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include

matter provided for in the special, the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

It is unnecessary, however, to apply this strict rule of construction to the present case. Section 24 (c), Act Oct. 6, 1917, as added by section 18 of Act March 10, 1928 (50 USCA Appendix, § 24 (c)) placed a limitation upon the payment of interest on taxes refunded under the Settlement of War Claims Act, which related to the special subject of the settlement of "claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian." The Settlement of War Claims Act embraced all of these subjects, and was in the nature of a final disposition thereof. Congress was here treating with a separate and individual matter unrelated to the Revenue Act of 1928, which contained no reference to the prior act or sought to retreat any of the provisions contained therein.

With this disposition of the case, it is unnecessary to consider the question of jurisdiction.

The judgment is affirmed.

Escher v. Burke

(At Law No. 78923 Decided by Mr. Justice Stafford of the Sup. Ct. of the D. C. on 2-5-31.)

Upon the best consideration I have been able to give this case I think the petitioners are right in their contention that the general statute allowing interest applies and that Clause "E" of Section 24 of the Settlement of War Claims Act, does not apply to property of friendly aliens which has been improperly seized.

